EXPERT REPORT OF DEREK BOK

Grutter, et al. v. Bollinger, et al., No. 97-75928 (E.D. Mich.)

I. Statement of Qualifications:

I am currently the 300th Anniversary University Professor at the John F. Kennedy School of Government at Harvard University. I served as President of Harvard University from 1971 until 1991, and as Dean of the Harvard Law School from 1968 to 1971. Before that, I was a member of the Harvard Law School faculty for 10 years. I have written extensively about issues of higher education and the consideration of race in admissions, as well as about issues relating to the American legal system. A complete *curriculum vitae*, including a list of publications, is attached hereto as Appendix A.

II. Information Considered in Forming Opinions:

My opinions are based, in large part, on The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions, William G. Bowen and Derek Bok, Princeton University Press (1998). A copy of the book will be provided upon request. I have also relied upon Linda Wightman's study, The Threat To Diversity In Legal Education: An Empirical Analysis of the Consequences of Abandoning Race As A Factor In Law School Admissions Decisions, 72 N.Y.U. L. Rev. 1 (1997), a copy of which will also be provided upon request. I have also relied on the other published materials cited herein.

III. Other expert testimony; compensation:

I have not testified as an expert, by deposition or at trial, within the preceding four years. I am not receiving any compensation for my work in connection with this matter.

IV. Opinions to be expressed and the basis and reasons therefor:

In addressing a constitutional challenge to the admissions program at the Medical School at the University of California at Davis, the Supreme Court examined a university's interest in achieving diversity among its *undergraduate* student body -- a goal that Justice Powell described as "of paramount importance in the fulfillment of its mission." Bakke v. Regents of the University of California, 438 U.S. 265, 313 (1978). I agree, based on my own experience with both graduate and undergraduate education, that the value and importance of diversity in undergraduate education is closely related to its value and importance in many graduate and professional courses of study.

My experience in legal education leads me to conclude that a university's interest in achieving diversity among its student body attaches to legal education, in ways that are largely similar to, although in some ways different from, the interest in achieving diversity in an undergraduate student body. Thus, while many of the opinions expressed herein were formed in the context of my study of undergraduate education, my own experience in legal education -- as a professor of law and as Dean of the Harvard Law School -- confirms Justice Powell's belief that "even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial." Id. at 314. Part A of this report accordingly focuses on

the importance to higher education of achieving a diverse student body. Part B describes an empirical analysis of the consequences of abandoning race as a factor in law school admissions. Part C addresses the particular importance of diversity in the context of legal education, as the exclusive gateway to the American legal profession.

A. The Shape of the River.

Higher education plays a unique role in our society. The university's obligation runs to the students whom it is to educate, and to the society at large that it is to serve. There is no escaping a university's obligation to try to serve the long-term interests of society defined in the broadest and least parochial terms, and to do so through two principal activities: advancing knowledge and educating students who will in turn serve others, within this nation and beyond it, both through their specific vocations and as citizens. Universities, and in particular their law schools, are responsible for imparting civic and democratic values that are essential to the functioning of our nation.

Our society -- indeed, our world -- is and will be multi-racial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end. In the 1960s, barely one percent of law students and two percent of medical students in America were black. At that time, few leading professional schools and nationally prominent colleges and universities enrolled more than a handful of blacks. Late in the decade, however, selective institutions set about to change these statistics, not by establishing quotas, but by considering race, along with many other factors, in assembling a diverse student body of varying talents, backgrounds, and perspectives. Schools sought to achieve diversity to cross the racial borders that separated large segments of society and to reap the educational benefits to all students of learning on a diverse campus, in which they would transcend the misperceptions and stereotypes that had been born of racial separation. These selective institutions recognized that a student body containing many different backgrounds, talents, and experiences would be a richer environment in which all students could better develop into productive, contributing members of our society.

Amid much passionate debate, there has been little hard evidence of how these policies work and what their consequences have been. To remedy this deficiency, William Bowen and I examined the college experiences of more than 60,000 students -- approximately 3,500 of whom were black -- who had entered 28 selective colleges and universities in the fall of 1976 and the fall of 1989.[1/] We also surveyed a sub-set of these students (with a survey response rate of about 80%) and thus studied the later life experiences and views of 30,000 students. This massive database, built jointly by the schools and the Andrew W. Mellon Foundation, for the first time links information such as Scholastic Assessment Test ("SAT") scores and college majors to experiences after college, including graduate and professional degrees, earnings, and civic involvement. Most of our study focused on African-Americans and whites, because the Latino and Native American populations at these schools were too small in 1976 to permit the same sort of

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1/ The 28 colleges and universities are: Barnard College, Bryn Mawr College, Columbia University, Denison College, Duke University, Emory University, Hamilton College, Kenyon College, Miami University (Ohio), Northwestern University, Oberlin College, Pennsylvania State University, Princeton University, Rice University, Smith College, Stanford University, Swarthmore College, Tufts University, Tulane University, University of Michigan at Ann Arbor, University of North Carolina at Chapel Hill, University of Pennsylvania, Vanderbilt University, Washington University, Wellesley College, Wesleyan University, Williams College, and Yale University.

statistical analysis. Nevertheless, many of the findings may be applicable to these groups as well. Our conclusions are set forth in The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions, William G. Bowen and Derek Bok, Princeton University Press (1998). This report attempts to summarize some of our findings. My testimony in this case will draw upon the book, as well as my 40 years of experience in academia, including my tenure as President of Harvard University and Dean of the Harvard Law School.

As a necessary predicate, it is important to recognize that a university should have the freedom to decide which students it will admit and which criteria it will use in its admissions decisions. This academic freedom is crucial in order for a school to fulfill its mission. At bottom, admissions officers must decide which set of applicants, *considered individually and collectively*, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society.

Any college or university to which admissions is highly competitive, such as the University of Michigan Law School, has far more applicants who possess all the basic qualifications than it has places. Some candidates (a relatively small number) are so outstanding in every respect that they are obvious choices for admission by any standard. The real problems of choice arise in deciding which individuals to admit from among the large group who also have very strong qualifications, who are thought capable of doing the work and doing it well, but who are not so clearly outstanding as to be placed in the very top category.

In my experience, in deciding among this group, a school does not start from the premise that any applicant has a "right" to a place in a college or university. Instead, the starting premise is that a school has an obligation to make the best possible use of the limited number of places in each entering class so as to advance as effectively as possible the broad purposes the school seeks to serve. Within the very real limits imposed by the fallibility of any selection process of this kind, a school should try hard to be fair to every applicant; but the concept of fairness itself has to be understood within the context of the obligations of a university. Accordingly, in making these difficult choices among well-qualified candidates, considerations other than just test scores and grades come into play.

The relevance of these other considerations is based on the premise that the overall quality of the educational program is affected not only by the qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. This is certainly the case in the context of undergraduate education, which was the primary focus of our study. It is also likely to be true of most graduate programs -- especially in the context of legal education, in which the Socratic method, class discussion, informal study groups, and extracurricular clubs and activities tend to figure prominently.

A great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of Princeton University observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."

It follows that if, say, 2,000 individuals are to be offered places in an entering class, the task of an admissions office is not simply to decide which applicants offer the strongest credentials as separate candidates for the college; the task, rather, is to assemble a total class of students, all of whom will possess the basic qualifications, but who will also represent, in their totality, an interesting and diverse

amalgam of individuals who will contribute through their diversity to the quality and vitality of the overall educational environment.

This concern for the composition of the student body, as well as for the qualifications of its individual members, takes many forms. While a college is of course interested in enrolling students who are good at a great many things and not one-dimensional in any sense, it should also try to enroll students with special interests and talents; it should seek a wide geographical representation; it should admit foreign students from a variety of countries and cultures; it should recognize the special contribution that the sons and daughters of alumni can make by representing and communicating a sense of the traditions and the historical continuity of the university; it should enroll students from a range of socioeconomic backgrounds; and it should work consciously and deliberately to include minority students, who themselves represent a variety of experiences and viewpoints. The precise contours of the institution's concern for the composition of the student body will of course vary. A liberal arts college, that views its mission as providing a well-rounded education for all of its students, may place greater emphasis on talents in the arts and athletics than may, for example, a graduate program in philosophy. In addition, the particular diversity characteristics that institutions choose to value will reflect the professional judgment, as well the academic values, of that institution.

We must accept as a fact of life in contemporary America that the perspectives of individuals are often affected by their race as by other aspects of their background. If a university were unable to take into account the race of candidates, it would be much more difficult to consider carefully and conscientiously the composition of an entering class that would offer a rich educational experience to all of its members. The unplanned, casual encounters with roommates, fellow sufferers in class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.

Indeed, the data in our study prove what I have observed for years through experience -- that diversity is valued and that "learning through diversity" actually occurs. Our study indicates that diversity is a benefit for all students, minorities and nonminorities alike. Moreover, the data overwhelmingly demonstrate that minority students admitted to selective schools had strong academic credentials, graduated in large numbers and did very well after leaving college. By every measure of success (graduation, attainment of professional degrees, employment, earnings, civic participation, and overall satisfaction), the more selective the school, the more blacks achieved (holding constant their initial test scores and grades).

It is true that compared with their extremely high-achieving white classmates, black students in general received somewhat lower college grades and graduated at moderately lower rates. The reasons for these disparities are not fully understood, and selective institutions need to be more creative in helping improve black performance, as a few universities already have succeeded in doing. Still, 75 percent graduated within six years from the school they first entered, a figure well above the 40 percent of blacks and 59 percent of whites who graduated nationwide from the 305 Division I universities tracked by the National Collegiate Athletic Association. Moreover, blacks did not earn degrees from these selective schools by majoring in easy subjects. They chose substantially the same concentrations as whites and were just as likely to have difficult majors, such as those in the sciences and engineering. These and other findings refute the argument that when black students are admitted to schools where many other students have stronger academic qualifications than their own -- as measured by grades and test scores -- that those students not only will drop out, but that they would have been better off attending a less selective institution.

Although over half of the black students attending these selective schools would have been

rejected under a race-neutral admissions regime -- that is, if only the same proportions of black and white students had been admitted within each SAT interval -- they have done exceedingly well after college. Fifty-six percent of the black graduates who had entered these selective schools in 1976 went on to earn advanced degrees. A remarkable 40 percent received either PhDs or professional degrees in the most sought-after fields of law, business and medicine, a figure slightly higher than that for their white classmates and five times higher than that for blacks with bachelor's degrees nationwide. (As a measure of change, it is worth noting that by 1995, 7.5 percent of all law students in the United States were black, up from barely 1 percent in 1960; and 8.1 percent of medical school students were black, compared with 2.2 percent in the mid-1960s. Black elected officials now number more than 8,600.)

By the time of our survey, black male graduates who had entered selective schools in 1976 were earning an average of $85,000 a year, 82 percent more than other black male college graduates nationwide. Their black female classmates earned 73 percent more than all black women with bachelor's degrees. Not only has the marketplace valued the work of these graduates highly, but the premium associated with attending one of these selective institutions was substantial. Overall, we found that among blacks with similar test scores, the more selective the college they attended, the more likely they were to graduate, earn advanced degrees and receive high salaries. This was generally true for whites as well.

Despite their high salaries, the blacks in our study were not just concerned with their own advancement. In virtually every type of civic activity, from social service organizations to parent associations, black men were more likely than their white classmates to hold leadership positions. Much the same pattern holds for women. These findings should reassure black intellectuals who have worried that blacks -- especially black men -- would ignore their social responsibilities once they achieved financial success.

Were black students demoralized by having to compete with whites with higher high school grades and test scores? Is it true, as Dinesh D'Souza asserts in his book "Illiberal Education," that "American universities are quite willing to sacrifice the future happiness of many young blacks and Hispanics to achieve diversity, proportional representation, and what they consider to be multicultural progress"? The facts are very clear on this point. Far from being demoralized, blacks from the most competitive schools are the most satisfied with their college experience. More than 90 percent of both blacks and whites in our survey said they were satisfied or very satisfied with their college experience, and blacks were even more inclined than whites to credit their undergraduate experience with helping them learn crucial skills. We found no evidence that significant numbers of blacks felt stigmatized by race-sensitive policies. Only seven percent of black graduates said they would not attend the same selective college if they had to choose again.

Former students of all races reported feeling that learning to live and work effectively with members of other races is important. Large majorities also believed that their college experience contributed a lot in this respect. Consequently, almost 80 percent of the white graduates favored either retaining the current emphasis on enrolling a diverse class or emphasizing it more. Their minority classmates supported these policies even more strongly.

Some critics allege that race-sensitive admissions policies aggravate racial tensions by creating resentment among white and Asian students rejected by colleges they hoped to attend. Although we could not test this possibility definitively, we did examine the feelings of white students in our sample who had been rejected by their first-choice school. They said they supported an emphasis on diversity just as strongly as students who got into their first-choice schools.

Our findings also clarify the much misunderstood concept of merit in college admission. Many people suppose that all students

with especially high grades and test scores "deserve" to be admitted and that it is unfair to reject them in favor of minority applicants with lower grades and test scores. But selective colleges do not automatically offer admission as a reward for past performance to anyone. Nor should they. For any institution, choosing fairly, "on the merits," means selecting applicants by criteria that are reasonably related to the purposes of the organization. For colleges and universities, this means choosing academically qualified applicants who not only give promise of doing well academically, but who also can enlarge the understanding of other students and contribute after graduation to their professions and communities. Though clearly relevant, grades and test scores are by no means all that matter.

Accordingly, an admissions policy that relied primarily on test scores would lead to the rejection of qualified minority students. The fact that, nationally, blacks are very underrepresented at the higher levels and very overrepresented at the lower levels ensures that they will have substantially lower average SAT scores even if a college were to use precisely the same SAT cut-off in admitting white and black students. For example, if a school admitted every applicant with SAT scores over 1100 and none with lower scores, the white students would still have a higher average SAT score than the black students because relatively more of them score at the upper end of the SAT distribution. This result occurs even though *no* racial preference was given in this hypothetical situation.

As a group, however, the black applicants are highly qualified. Of the black applicants at five of the 28 schools for which detailed admission data were available in 1989, over 90 percent scored above the national average for black test-takers on both the verbal and math SATs, considered separately. The large majority of these black applicants handily outscored not only the average black test-taker, but also the average white test-taker. Moreover, the average SAT score for black matriculants in 1989 was slightly higher than the average SAT score for *all* matriculants in 1951.

Talk of basing admissions mainly on test scores and grades assumes a model of admissions radically different from the one that exists today. Such a policy would mandate a fundamental change of direction for institutions that recognize the many dimensions of "qualification": the importance of a good fit between the student and the educational program, the varied paths that individuals follow in developing their abilities, and the pitfalls of basing assessments of talent and potential solely on narrowly defined quantitative measures. Instead, as I described earlier, admissions officers have been "picking and choosing," as we believe they should always do -- admitting the candidate who seems to offer something special by way of drive and determination, the individual with a set of skills that matches well the academic requirements of the institution, someone who will bring another dimension of diversity to the student body, or a candidate who helps the institution fulfill a particular aspect of its mission.

Because other factors are important -- including hard-to-quantify attributes such as determination, motivation, creativity and character -- many talented students, white and black, are rejected even though they finished in the top 5 percent of their high school class. The applicants selected are students who were also above a high academic threshold but who seemed to have a greater chance of enhancing the education of their classmates and making a substantial contribution to their professions and society. Seen from the perspective of how well they served the missions of these educational institutions, the students admitted were surely "meritorious."

Race remains a significant factor in our society. Race almost always affects an individual's life experiences and perspectives, and thus a person's capacity to contribute to the kinds of learning through diversity that occur on campuses. Both the growing diversity of American society and the increasing interaction with other cultures worldwide make it evident that going to school with "the likes of oneself" will be increasingly anachronistic. The advantages of being able to understand how others think and function, to cope across racial divides, and to lead groups composed of diverse individuals are

certain to increase. Moreover, our survey data throw new light on the extent of interaction occurring on campuses today and of how positively the great majority of students regard opportunities to learn from those with different points of view, backgrounds, and experiences.

In sum, the data indicate that there is a statistically significant association between attendance at the most selective institutions and a variety of accomplishments during college and in later life. If, at the end of the day, the question is whether the most selective colleges and universities have succeeded in both enhancing the learning experience for all students and educating sizable numbers of minority students who have already achieved considerable success and seem likely in time to occupy positions of leadership throughout society, I have no problem in answering the question -- absolutely.

B. Consequences of Abandoning Race as a Factor In Law School Admissions.

Without the conscious consideration of race as a factor in admissions, America's most selective law schools would be unable to enroll more than a trivial number of students from underrepresented minority groups. Linda F. Wightman conducted an extensive empirical study of the consequences of abandoning race-sensitive admissions policies in law school admissions, the results of which are published at 72 N.Y.U. L. Rev. 1 (1997). I am familiar with this work, and relied, in part, on Wightman's conclusions in The Shape of the River. Wightman examined data obtained for 90,335 students who applied to law schools in 1990-1, each of whom completed the Law School Data Assembly Service; and from fall 1991 first-year law students. Of the total of 90,335 students applying in that year, 57 percent received at least one offer of admission. This total included 42,287 whites, 3,435 blacks (6.8 percent), and 2,326 Hispanics (4.6 percent). She found that:

- A law school admissions policy that relied exclusively on undergraduate grades and LSAT scores would lead to a dramatic decrease in the number of minority applicants admitted to law school. For example, by employing a logistic regression model, Wightman found that of the 3,435 black applicants to law school in her study, only 711 (1.6 percent of the total students accepted) would have been admitted under a system that considered only grades and test scores. This is approximately the same number of black students who attended American law schools in 1965.

- The model set out above described the results that would obtain assuming that the pattern of schools to which students would apply would not change under a regime that did not permit the consideration of race as a factor in admissions. Wightman also employed a more conservative methodology, calculating the number of minority students who would have been admitted to law school under the assumption that all minority applicants who could be admitted by any law school would enroll in the most selective institution to which they were admitted. She described this as the "law school grid model." Under this set of assumptions, 3.4 percent of the entering law students in 1991 would have been black. There is good reason to question whether minority students would, in fact, apply to and enroll in the less selective schools to which this model predicts they would have been admitted.

- The "law school grid" model classified the ABA-approved law schools into six "clusters," ranked by selectivity. If the model were to hold, black enrollment in "Cluster 1," the most selective group of law schools (including the University of Michigan Law School), would fall to 0.4 percent.

- Among the 711 black applicants whom Wightman's "law school grid" model predicts would have enrolled in ABA-

approved schools, approximately 40 percent of those students would be admitted only to the least selective, "Cluster 6," law schools.

- Wightman also examined whether it would be possible to obtain meaningful diversity if law schools were to rely on other factors, such as socioeconomic status, the selectivity of the degree-granting undergraduate institution, and undergraduate major. Her study indicated that none of these factors provide viable alternative means to achieve racial diversity without the conscious consideration of race.

C. The Special Importance of Diversity in the Context of Legal Education.

American law schools provide the only means of access to the American legal profession. Accordingly, the importance of obtaining diversity among law school student populations cannot responsibly be examined without considering what would happen to the legal profession if law schools were unable to enroll and graduate diverse classes of students, as well as what the legal profession itself is telling the academy about the importance and value of diversity to the profession.

Justice Powell noted in Bakke, 438 U.S. at 312, that "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." This is certainly true of the nation's lawyers. This is not to say that minority lawyers are simply needed to serve minority populations. Rather, the future of the legal profession depends upon lawyers who are trained in racially diverse settings, who are comfortable working and interacting with clients with backgrounds, perspectives, and life experiences that are different from their own.

The law occupies a singular role in modern American society. Joseph Califano, in a recent speech, described the importance of the legal profession to American society:

> [I]n a turbulent democracy, lawyers are key to nourishing freedom and protecting it when it is threatened. Lawyers bear responsibility to craft ways for individuals to perceive and receive justice in a society that threatens to swallow citizens in ever larger and more impersonal government, corporate and union bureaucracies. Lawyers are key to prosecuting criminals and protecting law abiding citizens.
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> Without lawyers, equal protection is a phrase carved on a federal building. Without lawyers, legal segregation would still be a way of life in the nation's capital.
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> Lawyers should be the most reliable life preservers for a people tossed in a sea of powerful government and private institutions, slammed by tidal waves of scientific discovery and technological revolution. That's why it's worth a herculean effort to rebuild the credibility, respect and integrity of the profession.

Quoted in Harry T. Edwards, A New Vision For The Legal Profession, 72 N.Y.U. L. Rev. 567, 576-77 (1997).

In addition the social importance of the law as an institution, those in legal education have long recognized that many law students will not spend their careers engaged in the active practice of law, but will otherwise go on to play important roles in public life, in the corporate world, and as opinion leaders. This has always been true in the United States. Of the 52 signers of the Declaration of Independence, 25 were lawyers. Geraldine R. Segal, Blacks in the Law: Philadelphia and the Nation xiv (Univ. Penn. 1983) ("Segal"). So too have been 26 of the nation's 42 presidents. Id. It is therefore not surprising that, in 1950, G.W. Johnston observed

that "today's lawyers have a social responsibility to assume a position of leadership in the affairs of mankind," and argued that legal training must provide knowledge of "political, economic, social and human values." G.W. Johnston, Sociological and Non-Legal Courses, 23 Rocky Mt. L. Rev. 71-74 (1950).

At the time that Johnston wrote, of course, if law students were to learn "human values" in American law schools, they would by and large have been required to do so without the presence of minority students. It was not until the mid-1960s that American law schools classes contained more than a handful of minority students.

The first known black applicant to an American law school, John Mercer Langston (in 1850), was told that his application would be denied unless he agreed to "pass" as a Frenchman or a Spaniard. J. Clay Smith, Emancipation: The Making of the Black Lawyer, 1844-1944 34 (Univ. Penn. 1993) ("Smith"). Langston was also told that if he were to enroll, he would need to sit apart from the class; ask no questions; and behave "quietly." Id. He declined the offer.

Harvard Law School admitted George Lewis Ruffin, the first black law student known to attend an American Law School, in 1868. Id. at 36; American Bar Association Report of the Task Force on Minorities in the Profession ("ABA Report") at 52. A number of years before Ruffin enrolled at Harvard, on the eve of the Civil War, Cornelius Conway Felton, the president of Harvard University, explained that bringing together a diverse group of students (though along a different axis of diversity) would well serve the national interest: enrolling students "from different and distant States must tend powerfully to remove prejudices, by bringing them into friendly relations . . . .[s]uch influences are especially needed in the present disastrous condition of public affairs." Harvard University, The President's Report, 1993-1995 at 3. So although Ruffin, "faced hostility from students who sought to exclude him from the student assembly," the "geographical diversity of the student body at Harvard prevailed over those who considered blacks inferior." Smith at 36.

"It was at the University of South Carolina and the University of Michigan that blacks were first admitted and graduated from publicly supported law schools." Id. at 35. The number of minorities in American law schools, aside from a few black law schools, remained quite low for almost a century -- through the early 1960s. In 1965, only about 700 of the nation's 65,000 law students, or about 1 percent, were black. Segal at 2.

As a natural result, the legal profession was largely closed to minorities until that time. Blacks were generally excluded from the ABA until 1943. Smith at 41. In 1951, the Association of American Law Schools adopted an "objective" of "equality of opportunity in legal education," AALS 1951 Proceedings (1952). But despite this "objective," in 1964 the AALS Committee on Racial Discrimination reported that "few Negroes make application, and of those who do apply only a handful are accepted." AALS 1964 Proceedings (1964). In 1959, G. Franklin Edwards commented that the "law has not been regarded as a desirable profession among members of the Negro group," and that it was seen as a "starvation profession." G. Franklin Edwards, The Negro Professional Class 135 (Free Press 1959). "Parents deliberately discouraged their children from entering the legal profession. They were skeptical of the black lawyers's ability to obtain justice in the courts; they realized that a large proportion of the black community chose white lawyers to represent them; and they knew that black lawyers frequently had to associate themselves with white lawyers and split fees if they wanted clients." Segal at 4.

The absence of meaningful minority participation in American law schools and in the legal profession was, by the mid-1960s, a matter of particular concern, as American law schools recognized from the advent of the "legal realist" school in the 1930s that "legal theory does not exist of and by itself in a vacuum," and that "rights and obligations are inseparable . . . from the people, properties and business which they affect." Arch M.

Cantrall, Law Schools and the Layman: Is Legal Education Doing Its Job?, 38 A.B.A. J. 907 (1952). While American legal education has always encouraged what Justice Powell referred to as an "atmosphere of speculation, experiment and creation," Bakke, 438 U.S. at 312, until the mid 1960s the range of experience that could be drawn upon was far more limited than it is today.

The most persistent criticism of American legal education has been that it is too theoretical and abstract, divorced from the real problems of real people. Jerome Frank complained in 1950 that legal training paid insufficient attention to the "actual varied experiences" of practicing lawyers. Jerome Frank, Courts on Trial (1950). Despite the increased diversity in American law schools, a similar criticism is often heard today. Judge Harry Edwards of the D.C. Circuit, most notably, has recently attacked what he perceives as the disjunction between the doctrinal and theoretical focus of most American law schools, and the real world, nitty-gritty problems of clients seeking legal services. Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34 (1992); Symposium, Legal Education, 91 Mich. L. Rev. 1921.

There is some merit to these criticisms. At the same time, there is an important difference between the law schools of today and those of the 1950s -- the meaningful participation of a diverse group of students with varied life experiences. In today's law school, students' experiences with diversity -- in the classroom, in the study group, in the moot court competition and in various clinical programs -- clearly helps to provide the necessary training in the "real world" counseling and problem-solving skills that legal education might otherwise fail to provide. Indeed, some of these skills could not be learned in the absence of diverse educational settings.

The Supreme Court made this very point almost 50 years ago: "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and exchange of views with which the law is concerned." Sweatt v. Painter, 339 U.S. 629, 634 (1950).

It is important to recognize that law schools have not arrogated to themselves the authority to determine that diversity is good for the legal profession. Those in legal education have come to recognize the classroom benefits of a diverse student body. That academic interest in diversity has coincided with the demand of the legal profession itself that law schools send out into the profession diverse classes of young lawyers. In February 1984, the American Bar Association (ABA) created a Task Force on Minorities in the Legal Profession. That task force, after noting that "the legal profession has remained a largely segregated institution," observed that "[n]o segment of society is so strategically positioned to attack minority problems as the legal profession," and that the profession therefore "has a duty to do so." That duty, the report declares, "arises out of the unique offices that lawyers hold as ministers of the law and guardians of its conscience, and as teachers and advocates of fairness and equality." ABA Report at 6. Both the ABA and the AALS now require, as part of the law school accreditation process, that schools pursue diversity among their student bodies. ABA Standard 211 requires law schools to demonstrate "a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms." And AALS Bylaw Section 6-4 requires member schools to "seek to have a . . . student body [that is] diverse with respect to race, color, and sex."

The increased diversity in American law schools since the mid-1960s has had a profound effect on the profession. Census data indicates that there were 431 black lawyers in the United States in 1890. By 1940, the number stood at just over 1,200 -- 64 of whom practiced in the state of Michigan. Smith at 631-32. Since law schools began to implement race-conscious admissions policies in the mid-

1960s, the number of minority lawyers has risen dramatically. Even so, by 1990 only 8 percent of the nation's lawyers, and 12 percent of the nation's law students, were members of minority groups (African Americans, Asian Americans, Hispanics and Native Americans), at a time when members of these minority groups made up nearly twenty-five percent of the nation's population. Deborah L. Rhode, Professional Responsibility 53-54 (1994).

Bar leaders and others in the legal profession report that the increased participation of minorities has brought with it greater public confidence in the fairness and integrity of the legal profession. When the Supreme Court wrote, in 1896, that "we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment," Plessy v. Ferguson, 163 U.S. 537, 548 (1896), there were but a handful of minority lawyers in the nation. In that same period of time, the "nondiscriminatory policy of the University of Michigan Law School is apparently one of the reasons for the early entry of black lawyers into the profession in Michigan." Smith at 455. "As black lawyers began to graduate from the University of Michigan Law School, other lawyers appear to have migrated to the state," id. at 456, including David Augustus Straker, an 1872 graduate of Howard University Law School, who in 1890 won the first case ever argued by a black lawyer before the Michigan Supreme Court. Id. That case, Ferguson v. Gles, 46 N.W. 718 (Mich. 1890), decided six years before the Supreme Court decision in Plessy, secured public accommodations for blacks in Michigan. Segal at 149. Samuel E. McCargo, Emancipation in Michigan, 1985 Mich. Bar Journal 518 (1985).

The bar has made clear that it views the participation of minority attorneys as essential to public confidence in the machinery of justice. In 1989, for example, the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts concluded that the "presence of minorities in the [legal] profession increases public perception of fairness." If American law schools were precluded from considering race as a factor in admissions, this public perception, that the American legal system can be entrusted to provide equal justice under law, would be imperiled.

EXPERT REPORT OF KENT D. SYVERUD

Grutter, et al. v. Bollinger, et al., No. 97-75928 (E.D. Mich.)

I am Kent D. Syverud. I have been Dean and Garner Anthony Professor of Law at the Vanderbilt University Law School since 1997. For ten years, I was a professor at the University of Michigan Law School. For the last two years of my tenure there I also served as Associate Dean for Academic Affairs. In that role I worked with new and experienced teachers to improve the quality of teaching. I have also taught at the University of Pennsylvania Law School, the University of Tokyo Faculty of Law and Politics, and in Germany at programs sponsored by the Universities of Trier and Saarbrucken. I have taught and continue to teach courses in civil procedure, negotiation and drafting, and insurance law. I am the incoming editor of the Journal of Legal Education, which is the scholarly journal of the American Association of Law Schools. I frequently give addresses about law teaching, about the challenges of law teaching to lawyers, law teachers, judges and teachers at other universities. I have published an article on the challenges of teaching law students well. I have won teaching awards at the University of Michigan Law School, and, in my first year in my new position, at the Vanderbilt University Law School. Since 1991, I have regularly taught lawyers who are about to become law professors at the annual New Law Teachers Workshop of the Association of American Law Schools. Before becoming a law teacher I practiced law in Washington D.C.

I am not charging any fee for my expert services in this action. I am being compensated for my reasonable expenses. In the past four years, I have testified as an expert in three insurance matters: Dow Corning Corp. v. Hartford Accident & Indemnity Co. (Wayne County Circuit Court); Giant Eagle Inc. v. Federal Ins. Co. (W.D. Pa.); and Dow Chemical Co. v. Aetna (E.D. Mich.). I attach a copy of my current resume, which includes publications, to this report as an exhibit.

At the beginning of my career as a law teacher, I was skeptical of efforts to consider race as a factor in law school admissions. I was also skeptical that considering race as a factor in admissions had a positive impact on the educational experience of law students. My views on whether law schools should consider race in admissions have changed. The change has been gradual, and the product of many experiences teaching many students in many settings. I have in particular had the experience of teaching the same subject matter to classes that are racially homogenous and racially heterogeneous, and to classes where non-white students make up a tiny fraction of the enrolled students and where their numbers are more significant.

I have come to believe that all law students receive an immeasurably better legal education, and become immeasurably better lawyers, in law schools and law school classes where the student body is racially heterogeneous. It has been my experience from many conversations over the years that the vast majority of committed law teachers agree. When my students reflect on their law school experience, whether black or white, Asian or Hispanic, conservative or liberal, they also often volunteer this conclusion. I now view this agreement as indicating that those people most directly involved in the law school classroom can see the difference that racial heterogeneity makes in legal education. I have many reasons for now believing that considerations of race in law school admissions are particularly vital to providing the best possible legal education and to training the best possible lawyers.

The first reason is the unique way learning happens in the best law school classrooms. Most first-year classes in law schools are conducted by the Socratic method, in which professors call upon individual students and engage in a dialogue of questions and answers in front of the entire class. There are many variants of this method, but most professors continue to single out individual students each day to answer a series of questions suggested by the assigned reading. In my own civil procedure class, I call upon each student several times a semester, usually questioning each student for

fifteen to twenty minutes. The purposes of this method are manifold; they include the desire to engage the student closely and carefully with a legal text and to make the classroom dynamic, lively, and interesting. At least as important, the method consciously seeks to make the students think, to learn from each other, and to learn to be able to see any set of facts from different points of view. Students are expected to draw upon their own backgrounds and experiences in answering questions and in making arguments. Rather than passively receiving the accumulated wisdom of the professor, students are required to grapple with their own viewpoints, and those of their colleagues, on an array of difficult situations posed by the professor and the text. The result is that, in the best classrooms, every voice is heard, and the quality of the education received is largely a function of the diversity of viewpoints and experiences among the students in the class.

It is my view, based on my experience, that racial heterogeneity dramatically enhances the ability of the best active, Socratic teaching to achieve its purposes. My best class sessions, by far, have been characterized by direct and often painful dialogue between students who are forced by the method to confront and make explicit their deepest unexamined convictions about legal issues, and also to engage in discussion with those who, because of different experiences and often because of different race, do not share those convictions. Those class sessions produce the most careful thinking, and when handled with care are the most challenging and appropriate education I can offer. It has been my experience that racial diversity in the Socratic classroom strongly fosters the kind of thinking that the best lawyers need to be able to do.

For a related reason, racial heterogeneity in a Socratic classroom produces better lawyers. As a law teacher, I am constantly struggling with the need to teach new students the obligations of a lawyer to become a zealous advocate for a client and a skilled negotiator with adversaries and others. A basic component of excelling in these roles is the ability to understand the views, goals, and tactics of a client or adversary. Good advocacy first requires understanding both the client and the adversary. Yet most of my students come to law school with strong advocacy skills and poor listening skills; they assume they already know what the viewpoint of a client or adversary must be in every situation. In particular, they often assign to people of different races and ethnic backgrounds viewpoints that are uninformed by experience or by direct dialogue with a client or adversary. They are often very wrong. They don't know what they don't know, and it is my job to show them what they have to learn, every time, from every individual client or adversary.

Nothing teaches this lesson better than a classroom where, because of abundant racial heterogeneity, common assumptions about viewpoints of different races are constantly confronted by frank discussion that at times confirms and at times profoundly confounds those assumptions. I have seen this demonstrated repeatedly, both in my civil procedure classes taught via the Socratic method and in the upper level skills class I teach on negotiation.

There is abundant criticism of legal education for failing to teach students the skills they will need to succeed as lawyers. It is an important responsibility of law schools to teach students to become able negotiators, problem solvers, managers, counselors, investigators, and mediators. It also is vital that the lawyers we train be able to participate to the fullest in a democratic society in which they will have a vital role, as officers of the court, in preserving justice. It has been my experience that skills instruction is enhanced dramatically for all students by the interaction in class of future lawyers of all races, and by the different and at times unpredicted viewpoints different people bring to the discussion. It is also my experience that civil democratic discourse among lawyers of all races, in public and in court, is something that, once experienced in the law school classroom, is valued outside it and across my students' careers.

Racial heterogeneity thus helps make better lawyers at the same time it assures that classroom discussion will not become so theoretical as to be

divorced from the real differences in viewpoints that characterize many of the clients my students will need to serve.

Some examples from my teaching experience may better explain why I have come to hold these views. In my civil procedure course each year, I teach students how the finder of fact, whether judge or jury, is selected in the American federal and state systems, as well as under systems in other countries. I teach jury selection by having six to twelve students in the class assume the role of potential jurors, who are questioned by classmates serving in the role as defense and plaintiff's counsel. Male student jurors pretend to be their own fathers; female student jurors pretend to be their own mothers. The students answer the searching voir dire questions accordingly, often revealing unexpected differences in backgrounds and viewpoints that are shocking and enlightening to the class. When challenges are exercised by the plaintiff and defense counsel, it is often the case that both black and white students strike both black and white jurors. The reasons they give, and the analysis that ensues, is remarkable to all students. The ensuing discussion of the peremptory challenge is incomparably richer than would be possible without racial heterogeneity, and the students, I believe, are incomparably better trained to understand the roles they will serve in American civil trials.

I have found that racial heterogeneity improves the quality of my classes even and especially when the subject seems far removed from issues traditionally associated with race in American law. In insurance law, I have found that my teaching of the regulation of insurance products aimed at consumers changes dramatically when the makeup of the class is racially diverse. In civil procedure, my teaching of remedies (including the remedy of garnishment) and of attorneys' fees and costs has been significantly improved, for all students, by having a diversity of views expressed among my black students as well as among my white students.

For all these reasons, I now believe racial heterogeneity is a very important contributor to a quality legal education for all students, and to the training of the best lawyers. I think a law school without significant representation of black, white, Asian, and Hispanic students in the student body will provide a significantly poorer education than a law school blessed by such a representation. And I think a lawyer trained in a law school that is racially homogeneous, will be, in the coming decades, ill-equipped to serve the functions the best lawyers will need to serve in our democracy.

EXPERT REPORT OF ROBERT B. WEBSTER

Grutter, et al. v. Bollinger, et al., No. 97-75928 (E.D. Mich.)

I. Statement of Qualifications:

I am a member of the law firm of Clark Hill P.L.C. I have served as Chairman of that firm and am currently resident in its Birmingham, Michigan office. I have been with Clark Hill since 1982, and I was a member of one of its predecessor firms from 1969 to 1973.

In 1973, I was appointed by Governor William Milliken to the Sixth Judicial Circuit, Oakland County Circuit Court. I served in that capacity from 1973 through 1982. I served as Chief Judge of that Court from 1976 though 1978.

Within the State Bar of Michigan I have held the positions of Commissioner (1982-1990), Vice-President (1987-1988), President-Elect (1988-1989), and President (1989-1990). I have served on numerous State Bar committees, and was appointed by the Supreme Court of Michigan to chair the Committee to Revise and Consolidate the Michigan Court Rules. In that capacity I was charged with responsibility for directing the first general revision of the Michigan Court Rules since 1963; I subsequently also served as co-author of *Michigan Court Rules Annotated* (West 1985), a standard text on Michigan practice. I also served on the Michigan Supreme Court Task Force on Gender Issues in the Courts and, in that role, reviewed the report of the Michigan Supreme Court Task Force on Racial / Ethnic Issues in the Courts and related materials.

I have been a member of the House of Delegates of the American Bar Association since 1990 and a Fellow of the American College of Trial Lawyers since 1991. A complete *curriculum vitae*, including list of major publications, is attached as Appendix A.

II. Information Considered in Forming Opinions:

My opinions are based primarily upon knowledge and insight gained in the forty years in which I have been a practicing attorney, counselor, arbitrator, mediator, bar officer, and state court judge. My opinions are also based in part upon materials described in Section IV.B, within, copies of which will be provided upon request.

III. Other expert testimony: compensation:

Within the past four years, I have testified as an expert on several occasions regarding issues such as attorney malpractice (standard of care) and reasonableness of attorney fees. Time spent working on this matter is being charged at the rate of two--hundred dollars per hour.

IV. Opinions to be expressed and the basis and reasons therefor:

A.

One of the most important skills for a lawyer to develop is that of being able to understand and work well with individuals of diverse backgrounds, including racially diverse backgrounds. A lawyer will simply be more effective in the profession if he or she can think empathetically, interact comfortably with people whose perspectives and life experiences are different from their own, and resist stereotypes and other obstacles to understanding.

This is important for attorneys in virtually every aspect of the profession. It is obviously important for trial lawyers, who must interact persuasively and perceptively with clients, witnesses, opposing counsel, judges, and juries - people who may be of diverse races and backgrounds. But it is important for many other kinds of attorneys as well, including those who negotiate business transactions, mediate disputes, draft agreements, or provide advice concerning divorces, estate plans, or living wills. And as our society becomes increasingly multicultural and diverse - and as our boardrooms and bar associations and business meetings and communities follow suit - this skill becomes increasingly important. Simply put, ours is a profession of service, and it must keep pace with the Nation it serves.

This skill - being able to understand and work well with individuals of diverse backgrounds -- is also related to issues of professionalism. Responsible attorneys act not only as advocates and advisors, but as counselors. An attorney is a more effective counselor if he or she has developed this capacity. If we want our attorneys to act as - professionals and as counselors - and not just as "hired guns" who attend only to the bottom line and the billable hour - then we must enable and expect them to develop this skill as early as possible in their careers.

Of course, this is also critical to the many other roles that members of our profession disproportionately play in our society: community leaders; board members; law enforcement officials; legislators; public servants; and so on. I personally found this skill indispensable to my service as a member of the judiciary. Unfortunately, because my exposure to people of other races was so limited before I was appointed to the bench, I was forced to learn about these issues "on the job" and after I had been practicing law for more than fifteen years.

I grew up in a predominantly white neighborhood and attended predominantly white schools, including Baldwin High School in Birmingham, Michigan. I attended the University of Michigan as an undergraduate (B.A., 1955) and as a law student (J.D., 1957). My memory is that my law school class had few, if any, students of color. After law school I joined the Detroit law firm that eventually became Hill, Lewis, Adams, Goodrich & Tait, a leading firm in the city. During this time I had very limited interactions with people of other races.

There was one exception to this. In 1967, rioting broke out in the City of Detroit and I was asked to represent a number of African American individuals who had been arrested. Observing how the justice system treated these individuals was an eyeopening experience for me. Learning even a little about their lives was a very important educational experience that changed my perspectives and challenged my assumptions. It is unfortunate that I only began to have these experiences a decade after I finished law school.

Indeed, it was not until I took the bench in 1973 that my education on these issues really began. As a partner in a prestigious big-city law firm practicing in the civil justice system in the nineteen-sixties, my exposure to African American attorneys

had been extremely limited. But my experience was entirely different as a judge presiding in a county that included a number of cities (such as Pontiac) whose populations were substantially African American.

In my years on the bench I watched, listened to, engaged with, and learned from a number of African American attorneys who appeared before me. By way of example, this includes an attorney who was the best cross-examiner I had ever - and to this day have ever - seen, and it includes an attorney whose quiet dignity and scholarship later led to an appointment to the federal bench. These encounters exposed and destroyed racial stereotypes I did not even know I harbored. And, again, I found myself exposed to new perspectives, new kinds of life experiences, new ways of looking at the world - indeed, new worlds. But I did not learn only about differences; I also learned about similarities, about how much of the human condition transcends racial boundaries. Now, more than ever, our profession needs lawyers to be bringing these kinds of skills and insights to the bench -- not to be acquiring them there.

In sum, the ability to empathize and work effectively with people of diverse races and backgrounds is critical to our profession. It is an ability that must be developed as proficiently, and as soon, as it possibly can. For it is finally this simple: we cannot represent someone as effectively, cannot counsel someone as insightfully, and cannot persuade someone as convincingly, if their race or background makes them a stranger to us.

B.

When law schools graduate racially diverse student bodies, the legal profession enjoys an incidental but important benefit: a diverse legal profession enhances the appearance of justice and increases public confidence that our system is fair, unbiased, and accessible to all.

Reports of various Michigan commissions and task forces confirm that the appearance of bias in the judicial system constitutes a significant concern.

In 1986, the Michigan Supreme Court formed the Citizens Commission to improve Michigan Courts. The Commission, supervised by Justice Patricia Boyle, was asked "to recommend to the Court ways in which the court system may be made more readily accessible and more responsive to the needs of citizens of this State."

The Commission divided itself into committees, held public hearings, reviewed hundreds of letters, and conducted surveys. As a result of the investigation, the Commission issued some fifty recommendations to the Supreme Court.

In the course of its recommendations, the Commission found that "Fully one-third of the citizens of the state of Michigan believe that blacks and women are not treated as well by the court system as are whites and men ..." The Commission therefore recommended that (among other things) the Supreme Court form a task force to study the extent and nature of the "disparate treatment accorded citizens."

In 1987, the Supreme Court responded by issuing Administrative Order No. 1987-6, creating a Task Force on Racial / Ethnic Issues in the Courts and a Task Force on Gender Issues in the Courts. These Task Forces issued Reports. Of particular importance here is the following finding by the Task Force on Racial / Ethnic Issues:

> Diversity is an important goal for a quality justice system. The presence of minorities in all areas of the profession is not a guarantee of unbiased behavior. However, the research done by the Task Force is conclusive on several points. First, the presence of minorities in the profession increases public perception of fairness. It further responds to the need of citizens to feel less isolated and alone within the

legal process. When asked an open-ended question regarding recommendations for ensuring equal and fair treatment in the Michigan Court system, 231 court users said "increase the number of female and racial / ethnic minority judges and attorneys." The next highest response, "speed up the system," gained only 47 proponents.

In the fall of 1996, State Bar President Victoria Roberts created the State Bar Task Force on Race / Ethnic and Gender Issues in the Courts and Legal Profession to determine what, if any, progress had been made toward the goals identified in the earlier reports. In 1998, the Task Force issued its conclusions. This quotation from the executive summary of that report underscores the importance of diversity in the profession to the appearance of fairness:

> The appearance of bias, as well as the reality of bias, damages our profession and our courts in their fundamental role as protector of freedom and dispenser of justice. In a very real sense, the implementation of these recommendations continues the process of insuring that the Michigan justice system accurately reflects the diversity of the constituency it serves, and that participants at all levels are afforded a level playing field upon which to operate.

I believe that task forces in other states have reached similar conclusions.

In sum, when diverse classes of law school students enter the legal profession it enhances the appearance that our system is just, unprejudiced, and equally available to people of all races. Of course, the educational reasons law schools admit a diverse array of students - and the policies they use to do it - are beyond my expertise and personal knowledge and I offer no opinions with regard to these issues. Nevertheless, as an attorney, bar leader, and former judicial officer I know that a system of justice only works well if people respect it, and that people cannot respect a system that appears to be unfair, to perpetuate prejudice, and to exclude certain people from its administration.